INDEX

CITATIONS

417-301—71——1

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 785

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY, TENNESSEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 149–155) is reported at 427 F. 2d 312. The Board's decision and direction of election in the representation proceeding (R. 61–66) are reported at 167 NLRB 691. Its decision and order in the ensuing unfair labor practice case (R. 138–145) are reported at 170 NLRB No. 156.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1970, and the Board's timely petition for rehearing *en banc* was denied on June 5, 1970 (R.

156–157). On August 29, 1970, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to, and including, October 1, 1970 (R. 158), and the petition was filed on that date; it was granted on January 11, 1971 (R. 158). The jurisdiction of the Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, *et seq.*), and of the Tennessee Code (Secs. 6-2601, *et seq.*), are set forth in the Appendix, *infra*, pp. 21-30.

QUESTIONS PRESENTED

1. Whether federal rather than state law governs the determination, under Section 2(2) of the National Labor Relations Act, whether an entity created under state law is a "political subdivision" of the state and therefore not an "employer" subject to the Act.

2. Whether the Board properly concluded that the respondent public utility district is not a political subdivision of the State of Tennessee, and whether, under the correct standard of judicial review, the court of appeals should have upheld that determination.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On April 24, 1967, Local No. 102, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, filed a petition with the Board, pursuant to Section 9(c) of the National Labor Relations Act,

seeking to represent the pipefitters employed by the Natural Gas Utility District of Hawkins County, Tennessee. The District moved to dismiss the petition on the ground that it was a political subdivision of the State of Tennessee and thus not an employer within the meaning of Section 2(2) of the Act (R. 61; 6–7). The Board rejected this contention and directed that an election be held (R. 62–66). The Union won the election and was certified as the employees' representative (R. 69–70). Upon the District's subsequent refusal to recognize and bargain with the Union on the ground that it was not an employer under the Act, the Union filed an unfair labor practice charge which initiated the present case (R. 72–74). The facts with respect to the District's status as an employer under the Act are as follows:

The District sells and distributes natural gas, without profit, to residential homes, commercial businesses, and industrial firms in Hawkins County, Tennessee (R. 62; 11). It was incorporated in December 1957, under the Tennessee Utility District Law of 1937 (App., *infra*, pp. 21–30).[1] Pursuant to that law, a group of local real property holders in Hawkins County filed a petition with the County Court setting forth a statement of the need for the service to be supplied, an estimate of the cost, and the names of three local residents proposed as commissioners of the District (R. 64, n. 7; 56–58). Following a hearing, the Chairman of the County Court of Hawkins County

[1] There are about 270 similar utility districts in the state (R. 102).

approved creation of the District and granted the petition (R. 60–61). As required by the state statute (App., *infra*, p. 23), the County Judge appointed as commissioners of the newly created District the three people nominated in the petition (R. 64, n. 8; 61).[2]

The powers of the District are vested in and exercised by the three-member board of commissioners, who are not subject to state or county regulation (R. 12–14; App., *infra*, pp. 23–25). The commissioners adopt necessary rules or regulations, and set the fees charged for the District's services (R. 13; App., *infra*, pp. 27–28). They also control the labor relations policy of the District. The manager of the District, who is under the supervision of the board of commissioners, hires and fires its employees and sets their wages (R. 13–14). Neither the state nor the county has any control over the District's employees, and they are not considered state or county employees (R. 14, 155), whose labor conduct might be specially restricted as a matter of public policy.

No public money was utilized in organizing the District; it was financed through the private sale of bonds of nearly two million dollars (R. 130, 117–118). With the proceeds, the District constructed a natural gas distribution system (R. 130), which, under the statute, became subject to a lien in favor of the bond-

[2] The Tennessee statute provides that, in counties having a population of 482,000 or more, commissioners of utility districts shall be elected by the qualified voters in the District (App., *infra*, pp. 25–26). This provision is inapplicable to Hawkins County.

holders until the bond debt was paid. (App., *infra*, pp. 28–29). Principal and interest on the bonds are payable solely from the revenues of the District (App., *infra*, pp. 29–30). Rates charged by the District must be sufficient to pay its expenses, plus the bond debt as it comes due (App., *infra*, p. 30).

The statute under which the District was organized provides that a utility district is a " 'municipality' or public corporation," and exempts it from "state, county and municipal taxation" (App., *infra*, pp. 23, 30). The Supreme Court of Tennessee has upheld this tax exemption on the ground that utility districts are "arms or instrumentalities" of the state (R. 62–63).[3] The statute further gives the District the power of eminent domain (App., *infra*, pp. 24–25), and empowers the board of commissioners to inquire into any matter relating to the affairs of the District and to issue subpoenas and administer oaths for this purpose (App., *infra*, p. 27). The District, however, has no power to levy or collect taxes and its charges for services are not construed to be taxes (R. 62, n. 2; App., *infra*, p. 23).

B. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS

In its initial decision in the representation proceeding (R. 61–66), the Board rejected the District's contention that it was a political subdivision of the State

[3] *First Suburban Water Utility District* v. *McCanless*, 177 Tenn. 128, 146 S.W. 2d 948, 950; this opinion did not concern itself in any respect with labor relations questions.

of Tennessee within the meaning of Section 2(2) of the National Labor Relations Act and thus not subject to the Act. The Board noted that the Tennessee statute specifically states that a utility district is a "municipality" or "public corporation" and that the Supreme Court of Tennessee had concluded that such districts are "arms or instrumentalities" of the state; but it held that such characterizations are not controlling in interpreting the National Labor Relations Act. Noting that the scope of the National Labor Relations Act is to be determined by federal standards and not by the varying declarations and classifications of state law (R. 63, n. 4), the Board examined the relevant factors and concluded that the District was "an essentially private venture, with insufficient identity with or relationship to the State of Tennessee to support the conclusion that it is an exempt governmental employer under the Act" (R. 63).

In the subsequent unfair labor practice proceeding, the Board relied on its earlier determination that the District was an "employer" covered by the Act (R. 140–141). Accordingly, the Board held that the District's refusal to bargain with the Union selected by its employees violated Section 8(a)(5) and (1) of the Act (R. 143). The Board ordered the District to cease and desist from the unfair labor practices found, to bargain with the Union upon request, and to post appropriate notices (R. 144–145).

A divided court of appeals declined to enforce the Board's order (R. 149–155), ruling that state law was controlling on the issue whether the District is a

"political subdivision" within the meaning of Section 2(2) of the Act. The court stated (R. 153–154):

> In our opinion, the state has a right to create its own political subdivisions, and when its creations have been held by the state's highest court to constitute political subdivisions that ought to be binding on federal administrative agencies.
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> * * * * * * *
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> In our judgment, the present case involves more of a question of *municipal law* than a *labor problem,* and the decision of the Supreme Court of Tennessee was of controlling importance on the question whether the District was a political subdivision of the state. In our opinion, it was binding on the Board. [Emphasis in the original.]

SUMMARY OF ARGUMENT

I

The court below erred in holding that a decision of the Supreme Court of Tennessee finding utility districts properly exempt from taxation under state law was controlling for purposes of determining whether such a district is a "political subdivision" of the state within the meaning of the exemption in Section 2(2) of the National Labor Relations Act. Nothing in the Act's history or purposes indicates it "is to be administered in accordance with whatever different state standard the respective states may see fit to adopt for the disposition of unrelated, local problems." *National Labor Relations Board* v. *Hearst Publications,*

322 U.S. 111, 123. Rather, the exemption is properly interpreted with a view toward the manner in which employment relations are carried on. To give controlling weight in the administration of federal labor law to mere characterization regarding what constitutes a "political subdivision" would produce a haphazard result, with no unifying policy or purpose. As this Court implicitly recognized in *Division 1287, Motor Coach Employees* v. *Missouri,* 374 U.S. 74, the uniform administration that Congress sought under the National Labor Relations Act can be attained only by having federal rather than state law determine the extent of the Section 2(2) exemption.

II

Applying a uniform national standard, the Board reasonably determined that the District was not exempt from the Act as a political subdivision of the state under Section 2(2). The District is no more a direct creation of the State than privately-owned public service companies, which also require some form of governmental approval before they begin operations. It is completely autonomous in the conduct of its day-to-day affairs; the state has no power to remove or otherwise discipline the private individuals who control the District's operations and labor relations policies. The operations and services of the District "do not differ significantly from those of enterprises in private industry including utilities whose employees are entitled to the benefits of the Act" (R. 64). And its labor relations are entirely its own;

its employees are not state or county employees under local law. Weighing these factors in the context of all the other relevant considerations, the Board justifiably concluded that the District was not a "political subdivision" of the state. Whether or not the court below would have reached the same conclusion on its own *de novo* evaluation of the facts, it should have accepted the Board's considered judgment on this matter.

ARGUMENT

I. FEDERAL, RATHER THAN STATE, LAW GOVERNS THE DETERMINATION WHETHER AN ENTITY IS A "POLITICAL SUBDIVISION" OF A STATE WITHIN THE MEANING OF SECTION 2(2) OF THE NATIONAL LABOR RELATIONS ACT, AND THEREFORE NOT AN "EMPLOYER" SUBJECT TO THAT ACT

Section 2(2) of the National Labor Relations Act provides that the term "employer" shall not include "the United States or * * * any State or political subdivision thereof" (App., *infra*, p. 21). The term "political subdivision" is not defined in the Act and the legislative history is silent as to the meaning Congress intended to give it.[4] As with other coverage

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[4] However, the evident purpose of the governmental exemption as a whole was to avoid interference with the labor-management relations of federal, state, and municipal governments and their employees, since the latter traditionally lacked the right to strike against the government. See Leg. Hist. of the National Labor Relations Act, 1935 (G.P.O., 1949) 1117, 2653; Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948) 1535. See also Rhyne, *Labor Unions and Municipal Employee Law* (National Institute Municipal Law Officers, 1946) 436-437; Vogel, *What About the Rights of the*

questions under the Act,[5] it is reasonable to conclude that Congress intended that the determination whether an entity is a "political subdivision" of a state for purposes of the National Labor Relations Act be made under federal law, formulated by the Board subject to review by the courts of appeals and this Court, rather than under state law.

As this Court pointed out long ago, *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 123:

> Both the terms and the purposes of the statute, as well as the legislative history, show that Congress has in mind no * * * patchwork plan for securing freedom of employees' organization and of collective bargaining. The [National Labor Relations] Act is federal legislation, ad-

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Public Employee? 1 Lab. L. J. 604, 612–615 (1950). The relationship between the exemption and anti-strike provisions of state law is implicit in the decisions of this Court striking down state efforts to extend such provisions to other groups of employees. *Division 1287, Motor Coach Employees* v. *Missouri*, 374 U.S. 74; *Amalgamated Bus Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 383.

[5] See *Local No. 207, Int'l Assoc. of Bridge Workers Union* v. *Perko*, 373 U.S. 701 (whether an individual is a "supervisor" under Section 2(11)); *Marine Engineers Beneficial Assoc.* v. *Interlake Steamship Co.*, 370 U.S. 173 (whether an entity is a "labor organization" under Section 2(5)); *National Labor Relations Board* v. *United Insurance Co.*, 390 U.S. 254 (whether an individual is an "independent contractor" under Section 2(3)), *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U.S. 398, and *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416 (whether "militarization" or "deputization" of plant guards employed by a private employer removes them from the status of "employees" under Section 2(3)).

> ministered by a national agency, intended to solve a national problem on a national scale. * * * Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by * * * varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different state standard the respective states may see fit to adopt for the disposition of unrelated, local problems. * * *

This objective would be substantially impaired if state characterization was to control the determination whether an entity is a political subdivision of a state for purpose of exemption from the National Labor Relations Act. Cf. *Morgan* v. *Commissioner*, 309 U.S. 78, 80–81.

In administering the Act on a national basis, the Board has limited the exemption for political subdivisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate. *National Labor Relations Board* v. *Randolph Electric Membership Corp.*, 343 F. 2d 60, 63–64, n. 7 (C.A. 4).[6] This

[6] See *Mobile Steamship Assoc.*, 8 NLRB 1297, 1305, 1318 (state docks commission created by specific legislation of the State of Alabama); *Oxnard Harbor District*, 34 NLRB 1285, 1289–1290 (harbor district organized by district residents under general enabling legislation of the State of California, but governed by a board of commissioners elected by qualified voters of district); *New Jersey Turnpike Authority*, 33 LRRM 1528 (turnpike authority specifically created by the legislature and governed by members appointed by the governor, with the advice and consent of the senate); *New Bedford etc. Steamship*

test provides a reasonable and uniform standard for differentiating between essentially private employment relations and those controlled by the state or its components to such an extent that they are properly exempted from statutory coverage.

What that extent might be was also suggested by the decision of this Court in *Division 1287, Motor Coach Employees* v. *Missouri*, 374 U.S. 74, 81, in considering a claim that a state's seizure of a public utility had operated to make the state an "employer" within the meaning of the exclusion. Applying a standard implicitly federal, the Court held that

> the State's involvement fell far short of creating a state-owned and operated utility whose labor relations are by definition excluded from the coverage of the National Labor Relations Act. The employees of the company did not become employees of Missouri. Missouri did not pay their wages and did not direct or supervise their duties. No property of the company was actually conveyed, transferred, or otherwise turned over to the State. Missouri did not participate in any way in the actual management

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Authority, 127 NLRB 1322 (steamship authority created by Massachusetts statute, consisting of members appointed and removed by the governor with the advice and consent of the executive council); *Fayetteville-Lincoln Electric System*, 183 NLRB No. 19, 74 LRRM 1278 (utility system created by specific legislation and governed by board appointed by mayor, with the approval of city aldermen). Cf. *Lewiston Orchards Irrigation District*, 186 NLRB No. 121, 75 LRRM 1430 (irrigation district created by petition of landowners and governed by directors elected by landowners for their benefit, rather than by all qualified voters in a general election).

> of the company, and there was no change of any kind in the conduct of the company's business * * * *

Compare, also, *United States* v. *United Mine Workers*, 330 U.S. 258, 284-288, where a contrary set of facts led to the conclusion that miners in coal mines seized under the War Labor Disputes Act *were* federal employees. Where the state does not directly control the terms and conditions of employment, as it does not here, this Court has not found a state employment relationship permitting denial of the right to organize and to strike.[7] *Division 1287, supra;* see also *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U.S. 398; *National Labor Relations Board* v. *Howard Johnson Co.*, 317 F. 2d 1 (C.A. 3), certiorari denied, 375 U.S. 920.

Although a state has a vital interest in defining its political subdivisions and a special competence to do so, the considerations that may prompt a state to label an entity a political subdivision are varied and have no necessary relation to the purposes for which an exemption from the National Labor Relations Act is afforded. Thus, an entity created and operated by

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[7] In the Tennessee cases imposing restraints on freedom of employee organization and collective bargaining, it was specifically found that the employees in question were county or municipal employees. *Weakley County Municipal Elec. Sys.* v. *Vick*, 43 Tenn. App. 524, 309 S.W. 2d 792, 796; *City of Alcoa* v. *International Bhd. of Electrical Workers*, 203 Tenn. 12, 308 S.W. 2d 476; *Keeble* v. *City of Alcoa*, 204 Tenn. 286, 319 S.W. 2d 249. In the *Weakley County* case, *supra*, the court noted that employees of utility districts under the state legislation here were not city or county employees in that sense. 309 S.W. 2d at 805.

private individuals who are free from state control in fixing terms and conditions of employment may nonetheless be denominated a "political subdivision" for particular state purposes that have nothing to do with its "relation to the state and [its] actual methods of operation."[8] *National Labor Relations Board* v. *Randolph Electric, supra,* 343 F.2d at 64. Another state, or the same state for other purposes, may determine that a similar entity, equally uncontrolled, is not a "political subdivision"—again, for reasons unrelated to the factors that are significant under the National Labor Relations Act.[9] What must be con-

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[8] For example, in upholding the exemption of utility districts from taxation under state law as "municipalities" or "arms of the State," the Tennessee Supreme Court, in the decision relied on by the court below (R. 150), stated: "It is elementary that the Legislature may call such bodies what it pleases, and may give and take away as it chooses their powers and privileges." *First Suburban Water Utility District* v. *McCanless,* 177 Tenn. 128, 146 S.W. 948, 950. Similarly, in *Madison Suburban Utility District of Davidson County* v. *Carson,* 191 Tenn. 300, 232 S.W. 2d 277, 279, the Tennessee Supreme Court upheld the exemption of utility districts from state use and sales taxes, even though it recognized that:

"The appellant [utility district] does not have the power to levy taxes nor is it listed as a municipality under the Federal census and its population is never separately tabulated. The people residing within the district do not have the right of self-government. The district performs no governmental function except carrying on the business as a water and sewage company with all those powers necessarily connected therewith."

[9] See McQuillin, *Municipal Corporations,* Secs. 2.26–2.29 (Callaghan & Co., 3rd ed., 1949), for the varying approaches that may be taken under state law with respect to "municipal" or "quasi-public" corporations. See also *Lewiston Orchards Irrigation District* v. *Gilmore,* 53 Ida. 377, 23 P. 2d 720, 722; *In*

trolling is the manner in which the entity's labor relations are carried on. To give conclusive weight in the administration of federal labor law to state law characterizations would at the least invite a patchwork of policies, with no coherent sense or purpose, and might encourage measures such as this Court found preempted in *Amalgamated Bus Employees* and *Division 1287, supra,* n. 4.

Accordingly, while a state's characterization of a utility district or other entity as a political subdivision is a factor to be considered in determining whether it falls under the "political subdivision" exclusion of the National Labor Relations Act, that characterization cannot be conclusive. As the Fourth Circuit correctly concluded in *National Labor Relations Board* v. *Randolph Electric, supra,* 343 F. 2d at 63, the uniformity which Congress meant to secure in the administration of the National Labor Relations Act can be attained only by having federal, rather than state, law control determination of that question.[10] The court below thus erred in holding that the "decision of the Supreme Court of Tennessee was of controlling im-

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re Walker River Irrigation District, 44 Nev. 321, 195 P. 327, 331–332. Cf. *Local 266, Electrical Workers* v. *Salt River Project Agricultural Improvement District*, 78 Ariz. 30, 275 P. 2d 393.

[10] In urging that federal rather than state law determines whether utility districts are a political subdivision of the state under the National Labor Relations Act, we of course raise no question as to the propriety of such characterization for state law purposes. Nor do we here take any position on whether these districts are or are not political subdivisions under other federal legislation.

portance on the question whether the District was a political subdivision of the state", and was "binding on the Board" (R. 154).

II. THE BOARD CORRECTLY CONCLUDED THAT THE DISTRICT IS AN EMPLOYER WITHIN THE MEANING OF THE ACT

As shown above, pp. 3–5, the District was created, pursuant to general enabling legislation, upon a petition of local property owners which was approved by a County Judge. As the statute required, the County Judge appointed as commissioners of the District the three private persons nominated in the petition.[11] Thus, as the Board concluded, "the District is no more a direct creation of the State than such privately-owned public service companies as railroads, and motor carriers, which also require some form of governmental approval, such as a certificate of convenience and necessity" (R. 64, n. 7).[12] Nor is

[11] The County Judge may name a commissioner to the board only if a vacancy occurs and the two remaining commissioners are unable to agree on a third (App., *infra*, p. 25).

[12] The court below viewed this reasoning as "fallacious" because such public service companies "are operated for profit of their owners, whereas the District is owned and operated by the state, and not for the profit of private individuals" (R. 151). In fact, however, the utility system operated by the District is not state property, but is owned by the District itself, subject to a statutory lien in favor of the private bondholders and such other encumbrances as the board of commissioners may see fit to make (App., *infra*, pp. 24, 27, 28–29). The fact that the District is not operated for profit (R. 62) does not exempt it from the Act. *Office Employees International Union* v. *National Labor Relations Board*, 353 U.S. 313, 318–319; *Cornell University*, 183 NLRB No. 41, 74 LRRM 1269 (June 12, 1970).

Nor is there merit to the lower court's suggestion that the utility district here is significantly different from the electric

it "administered by State-appointed or elected officials" (R. 64).

Moreover, the Board found, the District "is completely autonomous in the conduct of its day-to-day affairs, with the State exercising no supervisory role with respect thereto, or reserving any power to remove or otherwise discipline those responsible for the [District's] operations" (R. 64). The record fully supports this finding. As the dissenting judge below pointed out (R. 155):

> The District's manager testified unequivocally that it is governed by the board of commissioners which adopts rules and regulations necessary to its operation; that the board sets all service rates; that the manager, and ultimately the board, hires and fires employees and determines wages; that neither the employees nor the District is controlled in any way by the county or state government.

The Board could reasonably conclude that these factors, plus the further fact that the District's

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membership cooperative involved in *Randolph Electric*, *supra*, because the District was formed for the benefit of the inhabitants of the community while the cooperative was formed for the exclusive benefit of its members (R. 151). Both entities were formed by private individuals for the benefit of themselves and their communities. Membership in the *Randolph* cooperative was available, without arbitrary or unreasonable limitations, to all applicants. 343 F. 2d at 63. Conversely, under Tennessee law, the inhabitants of a utility district have no absolute right to demand an extension of the service to their location. See *Chandler Investment Co.* v. *Whitehaven Utility District*, 44 Tenn. App. 1, 311 S.W. 2d 603, 611.

"operations and services do not differ significantly from those of enterprises in private industry including utilities whose employees are entitled to the benefits of the Act" (R. 64), outweighed such countervailing factors as the pronouncements of the State on the District's status as a "municipality" or "instrumentality" of the State, and its grant of power of eminent domain to the District.[13] See *City of Paris v. Federal Power Commission*, 399 F. 2d 983, 986 (C.A. D.C.). Of particular importance is the fact that District employees share neither the benefits nor the burdens of direct state or municipal employment. *Division 1287, supra; Weakley County, supra.*

In sum, the Board was warranted in holding that the District has an "insufficient identity with or relationship to the State of Tennessee to support the conclusion that it is an exempt governmental employer under the Act" (R. 63). Whether or not the court below would have reached the same conclusion on a *de novo* evaluation of the facts—and *Division 1287, supra*, suggests that it should have—there was ample support on review for the Board's considered judgment on this issue.[14] See *National Labor Relations Board*

[13] With respect to the District's power of eminent domain, the Board stated: "[W]e think it significant that legislatures have frequently delegated such power to nonexempt privately-owned and operated service corporations. Indeed, the Tennessee Legislature itself has delegated such authority to private corporations." (R. 64–65, and authorities there cited at nn. 9 and 10.)

[14] The Board also considered the other factors urged by the District in support of its claimed exemption—*e.g.*, the power of the commissioners to inquire into the District's affairs and to

v. *United Insurance Co.*, 390 U.S. 254, 260; *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 130–131; *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U.S. 398, 403–404, 412–415. The court of appeals therefore, should have upheld the Board's determination that the District is an employer under the Act.

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subpoena witnesses and administer oaths for that purpose, the requirement that the District publish its annual statement in a newspaper of general circulation, and the District's asserted special status under federal tax laws (R. 151). The Board's decision reflects its judgment that these factors, too, were outweighed by those supporting coverage. Nor was the Board's decision here inconsistent with its prior holdings. The language in the *New Bedford* decision, *supra*, 127 NLRB at 1324–1325, that state law is controlling on the scope of the Section 2(2) exemption, was not necessary to the result reached there, and was rejected by the Board in subsequent decisions such as *Randolph Electric*, and the present case. See *National Labor Relations Board* v. *Randolph Electric*, *supra*, 343 F. 2d at 63, n. 6.

Similarly, the decision that the utility district of Weakley, Carroll and Benton Counties, Tennessee was within the Section 2(2) exemption, Case No. 26–RC–2972 (R. 110–112), was made by the Board's Regional Director and was never reviewed by the Board itself. The decision here, which was made by the Board itself, postdates that decision (R. 140, n. 3).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to enforce the Board's order.

Respectfully submitted.

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FEBRUARY 1971.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Section 2. When used in this Act—
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> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof * * *.
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> Section 8(a). It shall be an unfair labor practice for an employer—
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> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

The relevant provisions of the Tennessee Utility District Act of 1937, as amended (Tennessee Code, Title 6, Chapter 26, Sees. 6-2601, *et seq.*), are as follows:

> 6-2602. *Petition for creation.*—A petition for the incorporation of a utility district may be submitted to the county judge or chairman of the county court of any county in which the proposed district is situated, said petition to be signed by not less than twenty-five (25) owners of real property, who shall also reside within the boundaries of the proposed district. Said petition shall include (a) a statement of the necessity for the service or services to be supplied by the proposed district; (b) the proposed corporate name and boundaries of the district; (c) an estimate of the cost of the acquisition

or construction of the facilities of the district (which estimate shall not, however, serve as a limitation upon the financing of improvements, or extensions of the facilities), and (d) the nomination of three (3) residents of the district for appointment as commissioners of the district. The petition shall be signed in person by the petitioners with the addresses of their residences and shall be accompanied by a sworn statement of the person or persons circulating the petition, who shall state under oath that he or they witnessed the signature of each petitioner, that each signature is the signature of the person it purports to be, and that to the best of his or their knowledge each petitioner was, at the time of signing, an owner of real property within and a resident of the proposed district.

* * * * *

6–2604. *Hearing and order of approval.*— Upon receipt of such petition it shall be the duty of the county judge or chairman of the county court to fix a time and place for a public hearing upon the convenience and necessity of the incorporation of the district. The date of such hearing shall be not more than thirty (30) days after the receipt of the petition and its date, place and purpose shall be announced by the county judge or chairman of the county court in a notice published not more than fifteen (15) days nor less than seven (7) days prior to the date of the hearing in a newspaper of general circulation in the proposed district, or if there be no such newspaper, then by posting such notice in five (5) conspicuous public places within the boundaries of the proposed district. If at said public hearing the county judge or chairman of the county court finds (a) that the public convenience and necessity requires the creation of the district, and (b) that the creation of the district is economi-

cally sound and desirable, he shall enter an order of the court so finding, approving the creation of the district, designating it as "the ---------- Utility District of ---------- County, Tennessee," defining its territorial limits and appointing as commissioners of the district those persons nominated in the petition, of whom one (1) shall be appointed for a term of two (2) years, one (1) for a term of three (3) years, and one (1) for a term of four (4) years. Such order shall be filed with the clerk of the court and entered on record. * * *

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6-2607. *District as municipality—Powers.*— From and after the date of the making and filing of such order of incorporation, the district so incorporated shall be a "municipality" or public corporation in perpetuity under its corporate name and the same shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes. Charges for services authorized herein, shall not be construed as taxes. The powers of each district shall be vested in and exercised by a majority of the members of the board of commissioners of the district. So long as the district continues to furnish any of the services which it is herein authorized to furnish, it shall be the sole public corporation empowered to furnish such services in the district and no other person, firm or corporation shall furnish or attempt to furnish any of the said services in the area embraced by the district, unless and until it shall have been established that the public convenience and necessity requires other or additional services; * * *

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6-2610. *Powers in carrying out purposes.*— Any district created pursuant to this chapter shall have the power;

(a) To sue and be sued.

(b) To have a seal.

(c) To acquire by purchase, gift, devise, lease or exercise of the power of eminent domain or other mode of acquisition, hold and dispose of real and personal property of every kind within or without the district, whether or not subject to mortgage or any other liens.

(d) To make and enter into contracts, conveyances, mortgages, deeds of trust, bonds or leases.

(e) To incur debts, to borrow money, to issue negotiable bonds and to provide for the rights of holders thereof.

(f) To fix, maintain, collect and revise rates and charges for any service.

(g) To pledge all or any part of its revenues.

(h) To make such covenants in connection with the issuance of bonds, or to secure the payment of bonds, that a private business corporation can make under the general laws of the state, notwithstanding that such covenants may operate as limitations on the exercise of any power granted by this chapter.

(i) To use any right-of-way, easement or other similar property right necessary or convenient in connection with the acquisition improvement, operation or maintenance of a utility, held by the state or any political subdivision thereof, provided that the governing body of such political subdivision shall consent to such use.

6–2611. *Eminent domain.*—Any district shall have power to condemn either the fee or such right, title interest, or easement in the property as the board may deem necessary for any of the purposes mentioned in this chapter, and such property or interest in such property may be so acquired whether or not the same is owned or held for public use by corporations, associations or persons having the power of eminent domain,

or otherwise held or used for public purposes; provided, however, such prior public use will not be interfered with by this use. * * *

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6-2613. *Exemption from state regulation.*—Neither the railroad and public utilities commission nor any other board or commission of like character hereafter created shall have jurisdiction over the district in the management and control of any system, including the regulation of its rates, fees, tolls or charges.

6-2614. *Terms of commissioners—Vacancies.*—The terms of office of the members of the board of commissioners first appointed shall be two (2), three (3) and four (4) years respectively from date of appointment and thereafter the term of office of the members shall be four (4) years. Members shall hold office until their successors are elected and qualify. Any vacancy shall be filled and new commissioners shall be elected or old commissioners shall be reelected upon the expiration of any term of office by vote of the other commissioners then in office. In the event the two (2) commissioners cannot agree upon a new commissioner to fill any vacancy, they shall certify that fact to the county judge or chairman of the county court within thirty (30) days of the date upon which such vacancy occurs, and, thereupon, within ten (10) days the county judge or chairman of the county court shall appoint a third commissioner to fill such vacancy. Provided, however, that in counties having a population of 482,000 or more according to the federal census of 1950 or any subsequent federal census the three (3) commissioners shall be appointed for terms to run until the first of the month following the next regular general county election and at the next regular general county election one (1) shall be elected by the qualified voters living within the boundaries of the district for a term

of two (2) years, one for a term of four (4) years and one or a term of six (6) years. After that, there shall be elected at the regular general election held in the county each two (2) years, a commissioner for a full term of six (6) years. All qualified voters living in the boundaries of the utility district shall be eligible to vote for such commissioners. Candidates for office as commissioner shall qualify with the county election commission at least forty-five (45) days before the date of the election, provided, further, that all utility districts in existence in any such county on March 20, 1959 shall proceed to elect their commissioners in the same manner as above provided for new utility districts.

6–2615. *Compensation of commissioners—Delegation of powers—Officers—Records—Qualifications.*—The members of the board, except as provided in the next paragraph, shall serve without compensation for their services, but shall be entitled to reimbursement for all expenses incurred in connection with the performance of their duties. The board may delegate to one (1) or more of its members or to its agents and employees such powers and duties as it may deem proper, but at its first meeting and at the first meeting of each calendar year thereafter it shall elect one (1) of its members to serve as president, and another of its members as secretary of the commission. The secretary shall keep a record of all proceedings of the commission which shall be available for inspection as other public records, and shall be custodian of all official records of the district. Only persons resident in the district shall be eligible for election to the board.

Except as to counties having a population of not less than 41,000 nor more than 41,600 according to the federal decennial census of 1960 or any subsequent federal census, and except as to any utility district containing less than five

counties, the members of the board of commissioners shall be entitled to receive compensation for their services in an amount not to exceed twenty-five dollars ($25.00) per day for each day's attendance of the meetings of said board in the performance of their official duties. The amount of compensation shall be fixed by the board of commissioners but the same shall not exceed the sum of twenty-five dollars ($25.00) per day. Provided, however, that no member of a board of commissioners shall draw compensation in excess of three hundred dollars ($300) for such services during any one calendar year.

6–2616. *Powers of commissioners.*—The board of commissioners of any district shall have power and authority;

(1) To exercise by vote, ordinance or resolution all of the general and specific powers of the district.

(2) To make all needful rules, regulations and by-laws for the management and the conduct of the affairs of the district and of the board.

(3) To adopt a seal for the district, prescribe the style thereof, and alter the same at pleasure.

(4) To lease, purchase, sell, convey and mortgage the property of the district and to execute all instruments, contracts, mortgages, deeds or bonds on behalf of the district in such manner as the board shall direct.

(5) To inquire into any matter relating to the affairs of the district, to compel by subpoena the attendance of witnesses and the production of books and papers material to any such inquiry, to administer oaths to witnesses and to examine such witnesses.

(6) To appoint and fix the salaries and duties of such officers, experts, agents and employees as it deems necessary, to hold office during the pleasure of the board and upon such terms and conditions as the board may require.

(7) To do all things necessary or convenient to carry out its functions.

6–2617. *Publication of annual statement.*—Within ninety (90) days after the close of the fiscal year of each district organized and operating under the provisions of this law, the commissioners of the district shall publish in a newspaper of general circulation, published in the county in which the district is situated, a statement showing (a) the financial condition of the district at the end of the fiscal year; (b) the earnings of the district during the fiscal year just ended; (c) a statement of the water rates then being charged by the district, and a brief statement of the method used in arriving at such rates.

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6–2619. *Purposes for which bonds authorized.*—Each district shall have power and is hereby authorized from time to time to issue its negotiable bonds in anticipation of the collection of revenues for the purpose of constructing, acquiring, reconstructing, improving, bettering or extending any facility or system authorized by this chapter, or any combination thereof, and to pledge to the payment of the interest and principal of such bonds all or any part of the revenues derived from the operation of such facility, system, or combination thereof. There may be included in the costs for which bonds are to be issued, reasonable allowances for legal, engineering and fiscal services, interest during construction and for six (6) months after the estimated date of completion of construction, and other preliminary expenses, including the expenses of incorporation of the district.

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6–2623. *Remedies of bondholders.*—There shall be and there is created a statutory lien

in the nature of a mortgage lien upon any system or systems acquired or constructed in accordance with this chapter, including all extensions and improvements thereto or combinations thereof subsequently made, which lien shall be in favor of the holder or holders of any bonds issued pursuant to this chapter and all such property shall remain subject to such statutory lien until the payment in full of the principal of and interest on said bonds. Any holder of said bonds or any of the coupons representing interest thereon may either at law or in equity, by suit, action, mandamus, or other proceeding, in any court of competent jurisdiction, protect and enforce such statutory lien and compel performance of all duties required by this chapter, including the making and collection of sufficient rates for the service or services, the proper accounting therefor, and the performance of any duties required by covenants with the holders of any bonds issued in accordance herewith.

If any default be made in the payment of the principal of or interest on such bonds, any court having jurisdiction of the action may appoint a receiver to administer said district, and said system or systems, with power to charge and collect rates sufficient to provide for the payment of all bonds and obligations outstanding against said system or systems and for the payment of operating expenses, and to apply the income and revenues thereof in conformity with the provisions of this chapter, and any covenants with bondholders.

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6–2624. *Bonds payable from revenue.*—No holder or holders of any bonds issued pursuant to this chapter shall ever have the right to compel the levy of any tax to pay said bonds or the interest thereon. Each bond shall recite in substance that said bond and interest thereon

is payable solely from the revenue pledged to the payment thereof and that said bond does not constitute a debt of the district within the meaning of any statutory limitation.

6–2625. *Rates sufficient to pay costs and retire bonds.*—The board of commissioners of any district issuing bonds pursuant to this chapter shall prescribe and collect reasonable rates, fees, tolls, or charges for the services, facilities, and commodities of its system or systems, shall prescribe penalties for the nonpayment thereof, and shall revise such rates, fees, tolls or charges from time to time whenever necessary to insure that such system or systems shall be and always remain self-supporting. The rates, fees, tolls or charges prescribed shall be such as will always produce revenue at least sufficient (a) to provide for all expenses of operation and maintenance of the system or systems, including reserves therefor, and (b) to pay when due all bonds and interest thereon for the payment of which such revenues are or shall have been pledged, charged or otherwise encumbered, including reserves therefor.

6–2626. *Exemption from taxation.*—So long as a district shall own any system, the property and revenue of such system shall be exempt from all state, county and municipal taxation. Bonds issued pursuant to this chapter and the income therefrom shall be exempt from all state, county and municipal taxation, except inheritance, transfer and estate taxes, and it shall be so stated on the face of said bonds.

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